No. 87-1489

In The

Supreme Court of the United States

October Term, 1987

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program,

Petitioners,

vs.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Are employers and administrators of pension fund surplus assets subject to common law and ERISA fiduciary duties in disposing of pension trust assets?

2. May an employer which has specifically given away the power to amend a pension trust to a retirement board dictate to that board amendments to a pension trust to use pension assets to benefit some but not all participants of the fund in order to confer an economic benefit on the employer?

3. Does an employer and/or a pension fund administrator violate the provisions of the pension plan when surplus assets are used to benefit some participants when the plan provides not only for the assets to be used for the exclusive benefit of all the participants and beneficiaries but also requires that the assets be used in a "non-discriminatory manner . . .for . . .a non-discriminatory cross-section of the members of the . . .plan"?

4. Does an employer violate the Age Discrimination in Employment Act when it offers a one-time early retirement incentive program to some employees 52, 53 and 54 years of age while excluding other employees 55 years of age and older?

5. Does a private cause of action exist under Title II of ERISA where the employer and administrator amend the plan to use assets which create a top-heavy early retirement plan?

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No.

In The

Supreme Court of the United States

October Term, 1987

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program,

Petitioners,

vs.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTORY STATEMENT

Fronefield and deFuria, by Leo A. Hackett, Esquire, on behalf of James C. Trenton, Sr., Frederick A. Ringbloom, Harry

G. Barlow and Earl L. Owens, individually, and on behalf of the class of employees of Scott Paper Company excluded from participation in the Highly Accelerated Retirement Plan of Scott Paper, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (5a) is reported at 832 F.2d 806. The opinion of the district court (15a) is reported at ____ F. Supp. ____ (E.D. Pa. 1987).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 9, 1987 (3a). A petition for rehearing was denied on December 4, 1987 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA), P.L. 96-364, 94 Stat. 1209, 29 U.S.C. §1101, *et seq.*, provides:

1. Section 3(2)(A), 29 U.S.C. §1002(21)(A):

> ". . . a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management or disposition of its assets."

2. Section 403(a), 29 U.S.C. §1103(a):

"Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees . . ."

3. Section 403(c), 29 U.S.C. §1103(c):

". . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

4. Section 404(a)(1)(A) and (D), 29 U.S.C. §1104 (a)(1)(A) and (D):

". . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purposes of: (i) providing benefits to participants and their beneficiaries; and . . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provision of this Title and Title IV".

5. Section 2(b), 29 U.S.C. §1101(b):

"It is hereby declared to be the policy of this Act to *protect* interstate commerce and the *interest of participants in employee benefit plans and their beneficiaries,* by requiring the disclosure and

reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligations for fiduciaries of employee benefits plans and by providing for appropriate remedies, sanctions and ready access to the Federal Courts." (Emphasis supplied.)

6. The Age Discrimination in Employment Act (ADEA) of 1982, 29 U.S.C. §§621 *et seq.*, makes it unlawful:

> "[Section 623(a)] [T]o discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's age."

STATEMENT OF THE CASE

Scott Paper Company ("Scott") created the Scott Paper Company Retirement Plan ("SERP") which originally was a defined contribution plan and later was changed to a defined benefit plan.

Under the terms of SERP, Scott *did not* retain the power to amend the plan. The power to amend the plan was granted to the Retirement Board which managed the pension plan. In March 1986, there existed a surplus in the pension plan.

In March 1986, Scott developed an early retirement plan designated the Scott Highly Accelerated Retirement Plan ("SHARP") and implemented the plan by directing the Retirement Board to adopt it and fund the additional payments necessary to carry out the plan from surplus assets in SERP. Scott also directed that SHARP be made available to corporate staff at Scott Headquarters and to certain select manufacturing locations. Scott

claimed that the selection of sites included and excluded was determined by whether it considered the plant to be "fat" or "lean" in number of employees.

Under SHARP, Scott retained the right to hold over any employee who elected to take this plan for up to two (2) years to train a successor or to fill a critical position. Scott also retained the right to limit the number of those who elected SHARP from any department or organizational unit of the company.

Petitioners are participants in SERP and employees of Scott at plant sites excluded from SHARP but who otherwise would have been eligible to participate in it.

SHARP was made available to four hundred twenty-three (423) participants in SERP and excluded seven hundred fifty-eight (758) participants in SERP.

Two hundred twelve (212) of the four hundred twenty-three (423) eligible participants were from corporate staff.

The total funding for SHARP came from SERP assets and none came from Scott.

The sole motive of Scott in developing SHARP was to improve the "bottom line" of Scott by reducing the number of employees.

Under SHARP, eligible participants age fifty-two (52) and older could retire with full retirement. Under SERP, a salaried employee of Scott can retire with full benefits at age sixty-two (62) or elect early retirement with reduced benefits at any time after reaching age fifty-five (55). If the employee elects early retirement under SERP, the employee's pension benefits are reduced by five percent (5%) for each year that the employee

is under age sixty-two (62). The SHARP plan eliminated the five percent (5%) per year penalty and allowed early retirement at age fifty-two (52).

SHARP's provisions were available on a one time only basis to certain SERP participants at corporate headquarters and selected plant sites. SHARP was the most financially attractive early retirement plan ever offered by Scott. In prior years Scott had conducted massive lay-offs of salaried employees primarily at the excluded plant sites but had not conducted such lay-offs of corporate staff.

Those eligible for and who elected to take SHARP included three (3) members of the management executive committee of Scott, two (2) of the four (4) members of the Retirement Board, the in-house general counsel to Scott, the president of the international division of Scott, six (6) vice-presidents and six (6) corporate officers.

SERP provided that:

> "(8.1) Subject to the provisions of Sections 8.3 and 8.4, all assets of the Plan shall be held by a Trustee or Trustees in trust for use in accordance with the Plan in providing the benefits and paying the expenses of the Plan, and no part of the corpus or income shall be used for, or diverted to, purposes other than for the exclusive benefit of members or their beneficiaries under the Plan or under any other retirement plan the assets of which are merged with the assets of the Plan, prior to the satisfaction of all liabilities with respect to such members and their beneficiaries. No person shall have any interest in or right to any part of the earnings of the Trust, or any rights in, or to,

or under the Trust or any part of the assets thereof, except as and to the extent expressly provided in the Plan and the trust instrument.

(9.5) Any discretionary acts to be taken under the Plan by the Board of Directors or by the Retirement Board with respect to classification of employees, contributions or benefits shall be uniform in their nature and applicable to all those persons similarly situated, and nc discretionary act shall be taken which shall be discriminatory under the provisions of Section 401(a) of the Code.

(9.6) (e) Any excess in reserves which shall result from the application of the foregoing restrictions upon benefit payments to certain employees shall be used and applied as provided in the Plan for the benefit of the other members of the Plan.

(12.1) Any or all of the provisions of this Plan may at any time or from time to time be modified or amended in whole or in part by action of the Retirement Board; provided, that no such modification or amendment may in any way . . . (iii) make it possible for any part of the assets of the Plan to be used for, or diverted to, purposes other than for the exclusive benefit of members and their beneficiaries under the Plan . . . ."

SHARP (III, 2.) provided that:

"The provisions of this Scott Highly Accelerated Retirement Program (the 'Program') shall be extended only to such business units, with such

> eligibility dates, during such selection periods, and with such initial retirement opportunity dates, *as may be designated by the Retirement Board in its sole discretion, such discretion to be exercised in a nondiscriminatory manner . . . THE RETIREMENT BOARD MAY WITHHOLD THE OFFERING OF THE PROGRAM TO OTHERWISE ELIGIBLE HIGHLY COMPENSATED MEMBERS OF THE SCOTT PLAN FROM A DESIGNATED BUSINESS UNIT EITHER PROSPECTIVELY OR RETROACTIVELY, IF THE RETIREMENT BOARD DETERMINES, IN ITS SOLE DISCRETION, THAT SUCH WITHHOLDING IS DESIRABLE TO ENSURE THAT THE PROGRAM IS OFFERED TO A NON-DISCRIMINATORY CROSS-SECTION OF THE MEMBERS OF THE SCOTT PLAN . . .* " (47a, emphasis added).

The SHARP plan could have been made available to all otherwise eligible participants without cost to Scott and within the pension trust surplus assets available.

The Retirement Board adopted SHARP as directed by Scott and made no independent judgment or inquiry.

REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the right of an employer to use, for its own purposes, surplus pension fund trust assets under the Employee Retirement Income Security Act. The right to direct the use of such assets without any fiduciary obligations under ERISA appears contrary to the principles established by this Court in *NLRB v. Amax Coal Co.*, 453 U.S. 322, 101 S. Ct. 2789 (1981). Another important ERISA issue is the right of an employer to amend a pension trust fund to use the assets where the employer/settlor of the trust has not retained the power to amend it.

In this case, the Third Circuit has attempted to describe the employer's primary motive of improving its bottom-line as a secondary effect not prohibited by ERISA. Not only was this the *stated primary motive* of the employer but, by treating the employer's motive in this manner, the court has placed the Third Circuit in conflict with the Second Circuit. The Second Circuit held in *Donovan v. Bierwith,* 680 F.2d 263 (2nd Cir. 1982), *cert. denied,* 459 U.S. 1069 (1982), that pension trust surplus assets could not be used to buy up stock of the employer/settlor to aid in a take-over battle attempt against the employer, even though preserving the employer's independence was considered to be in the best interest of the employee/participants. The court held that the fund managers were required to act with an eye singly to the interests of the participants and beneficiaries.

This decision of the Third Circuit also places it in conflict with the Fourth Circuit which held in *Mount Sinai Hospital of Baltimore, Inc. v. National Benefit Fund,* 697 F.2d 562 (4th Cir. 1982), that an employer could not require the managing board of a benefit plan covered by ERISA to use the fund surplus for the benefit of the employer.

The decision of the Court of Appeals of the Third Circuit permitting the use of surplus assets in a pension trust *without* any fiduciary duties or obligations is contrary to the provisions of ERISA and the common law of trust rules incorporated into it.

ERISA Section 3(2)(A) clearly defines a fiduciary to be any ". . . person [who] with respect to a plan . . . exercises any discretionary authority or discretionary control respecting . . . disposition of its assets".

The court of appeals held that if the employer could have taken the same action when it created the plan with its own money it could do the same thing later with surplus trust assets contributed to the plan for the sole benefits of the participants. These funds were contributed to the fund, pursuant to the plan on behalf of employees, to fund the retirement benefits for them. The court held that the employer or plan administrator in disposing of such trust assets is not a fiduciary under ERISA.

This result is not only contrary to the clear language of ERISA but also contrary to the spirit of the law. This result encourages employers to get rid of employees, for whom contributions have been made to a pension plan based upon an assumption of full retirement, at an age before they are eligible for retirement, in order to create a surplus which the employer can then use at its sole and unfettered discretion.

This is exactly what happened when Scott terminated hundreds of salaried employees without retirement benefits in the years preceding the SHARP plan. Most of these employees were terminated from plants excluded from SHARP.

In *NLRB v. Amax Coal Co.*, 453 U.S. 322, 101 S. Ct. 2789 (1981), this Court interpreted ERISA to incorporate the common law of trusts.

This result has been applied by the circuit courts, including the Third Circuit, in many cases.

The Third Circuit so held in *Trustees of Local 478 v. Silmens Corp.*, 721 F.2d 451 (3rd Cir. 1983); *Morse v. Stanley*, 732 F.2d 1139 (3rd Cir. 1984). The Second Circuit applied this principle in *Donovan v. Bierwith*, 680 F.2d 263 (2nd Cir. 1982).

Specifically with reference to pension plan surplus assets, the courts have held that ERISA fiduciary duties apply.

Mount Sinai Hospital v. National Benefit Fund, 697 F.2d 562 (4th Cir. 1982), held that the trustees of a benefit fund must be isolated from the whims of the employer, or a union, in the exercise of their fiduciary duties over trust surplus assets.

In *Deck v. Masters and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987), the court applied the fiduciary standards of ERISA to the attempted use of surplus pension plan assets for the benefit of the union.

And, in *Struble v. New Jersey Brewery*, 732 F.2d 325 (3rd Cir. 1984), the Third Circuit itself held that the ERISA fiduciary standards applied to the use of plan surplus assets.

Despite this authority, the Third Circuit held in the case *sub judice* that the fiduciary standards do not apply if the actions of the employer are called "design" rather than "administration".

Thus, the court concludes that if you can stamp the action with the word "design", actions involving the use of pension plan surplus assets are outside of ERISA.

It is submitted that the lower court placed form over substance and incorrectly assumed that the employer/settlor of a pension

trust can do the same things with someone else's money that it could do with its own.

The importance of this issue is illustrated by the cases which are pending in the federal courts raising the same points.

Siskind v. The Sperry Retirement Program, C.A. No. 86 Civ. 9014, in the United States District Court for the Southern District of New York, involves the same issue.

And, in *Belade v. International Telephone and Telegraph,* C.A. No. 83-87-383 (WWE), in the United States District Court for Connecticut, the same issue is involved.

The resolution of the issues presented in this petition will be dispositive of the issues in these pending cases, thus promoting judicial economy by saving many hours for the district and circuit courts. Further, since the other cases are in the Second Circuit, the resolution of the issues in this petition will avoid a possible further conflict between the circuits. Finally, any later decision by this Court in an appeal in the cases in the Second Circuit which results in a decision favorable to the excluded participants in those plans would leave the petitioners in this case without a remedy.

Next, the Third Circuit ignored the fact that SERP did not allow Scott to amend the pension plan. Only the Retirement Board could amend the plan and then only with the limitation under SERP §12.1 that the Board might not ". . . make it possible for any part of the assets of the plan to be used for or diverted to, purposes other than the *exclusive* benefit of members and their beneficiaries under the plan . . ."

The circuit court sought to skirt the issue of the power to amend by casting the issue in terms of whom had authority to design and implement SHARP. The court concluded that Scott

had that authority to say which of its employees should be eligible for an early retirement plan. Therefore, the court concluded that the Retirement Board had no choice but to adopt the plan as dictated by Scott.

That Scott could prescribe what it wanted to do with its employees *if it used its own funds* has no relation to the issue of the power to amend the pension trust *to use trust assets.*

As set forth in SERP §12.1, "any or all of the provisions of this Plan may at any time or from time to time be modified or amended in whole or in part by action of the Retirement Board; provided, that no such modification or amendment may in any way . . . (iii) make it possible for any part of the assets of the Plan to be used for, or diverted to, purposes other than the exclusive benefit of the members and their beneficiaries. . . ."

The authority to amend a pension trust plan depends on the terms of the plan. It is a long recognized principle of trust law that the creator or settlor of a trust may amend or change a plan by amending its terms only if it has reserved the right to do so in the plan document. G. Bogart, *Trust and Trustees,* §991 (2nd, Revised 1984); *see also,* A. Scott, *Scott on Trusts,* §331.

Section 402(b)(3) of ERISA, 29 U.S.C. §1102(b)(3) requires the pension plan to provide for a procedure to amend the plan and to identify the person or body who has authority to amend the plan.

In this case, Scott not only failed to reserve the power to amend but expressly granted it only to the Retirement Board. The SHARP plan itself recognized this and provided that the plan was to be carried out by the Retirement Board in its sole discretion, such discretion to be exercised in a non-discriminatory manner.

Scott has no authority to dictate to the Retirement Board an amendment to the pension plan or how the Board should exercise its discretion to amend or not amend the plan, or to carry out the plan if adopted.

The fact that Scott could do as it wanted with its employees has no relation to the fact that Scott had no power to amend the pension plan or to tell the Retirement Board to do so.

Next, the circuit court decision violates the ERISA requirement that the plan be carried out in accordance with the terms of the plan.

Clearly, SERP and SHARP required the pension plan and this particular amendment to it to be carried out in a non-discriminatory manner and to be applicable to a non-discriminatory cross-section of the members of the plan.

The lower court's approval of the application of SHARP to only some of the participants and primarily for corporate staff is contrary to the common sense reading of the language of the plan.

Next, a significant age discrimination claim is presented, based upon the one-time lowering of the early retirement age to fifty-two (52) years in SHARP but the exclusion of over five hundred (500) other eligible employees age fifty-five (55) years and over.

This case also raises the unresolved question of the existence of a private cause of action under *Cort v. Ash,* 422 U.S. 66 (1975), for violations of Title II of ERISA, which amended the Internal Revenue Code to regulate "top heavy" pension plans.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

LEO A. HACKETT
FRONEFIELD AND deFURIA
Attorneys for Petitioners

APPENDIX A — SUR PETITION FOR REHEARING DATED DECEMBER 4, 1987 TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1176

JAMES C. TRENTON, SR., et al.,

Appellants

v.

SCOTT PAPER COMPANY AND RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEE RETIREMENT PLAN

(Civil Action No. 86-2955 - E.D.Pa.)

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, *Chief Judge,* SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and ROSENN, *Circuit Judges.*

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

s/ Seitz
Circuit Judge

DATED: DEC. 4, 1987

APPENDIX A — JUDGMENT DATED NOVEMBER 9, 1987 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1176

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program,

Appellants

v.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. Civil No. 86-2955

Present: SEITZ, GREENBERG and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 29, 1987.

Appendix A

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered January 16, 1987 and March 27, 1987, be, and the same are hereby affirmed. Costs taxed against the appellants.

ATTEST:

s/ Sally Mrvos
CLERK

Certified as a true copy and issued in lieu of a formal mandate on December 14, 1987.

Test: s/ Sally Mrvos
Clerk, United States Court of Appeals for the Third Circuit

November 9, 1987

APPENDIX A — OPINION FILED NOVEMBER 9, 1987 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1176

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW and EARL L. OWENS, Individually and on behalf of the class of employees of SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program,

Appellants

v.

SCOTT PAPER COMPANY, and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN

Appeal from the United States District Court for the Eastern District of Pennsylvania

D.C. Civil No. 86-2955

Argued: September 29, 1987

BEFORE: SEITZ, GREENBERG, and ROSENN, *Circuit Judges.*

Filed: November 9, 1987

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

I. JURISDICTION AND SCOPE OF REVIEW

Appellants appeal from the order of the district court granting appellees' motion for summary judgment and denying appellants' motion for summary judgment.

The district court had jurisdiction under 29 U.S.C. §§ 216, 1132(e)-(f), 1303, 28 U.S.C. § 1331 (1982), and the doctrine of pendent jurisdiction. We have jurisdiction under 28 U.S.C. § 1291 (1982).

The scope of our review is plenary when reviewing grants of summary judgment. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

II. FACTS

Appellee Scott Paper Company ("Scott") is the sponsor of a number of employee benefit plans, including the Scott Paper Company Salaried Employees Retirement Plan ("SERP"). Scott also sponsors the Scott Highly Accelerated Retirement Program ("SHARP"), which is the subject of the instant appeal. Of the salaried Scott employees who are eligible for SERP, some employees are also eligible for SHARP. Appellants are the class of salaried employees of appellee Scott who are excluded from SHARP. Appellee Retirement Board of Scott Paper Company Salaried Employees Retirement Plan ("Retirement Board") is the managing board of SERP.

In an effort to provide an incentive to salaried employees at certain designated facilities to retire early and thereby reduce the salaried workforce at those facilities, Scott designed SHARP. The impetus for Scott's action was Scott's determination that those facilities were overstaffed. SHARP was implemented when the Retirement Board amended SERP to provide for the SHARP program in addition to the already-existing SERP plan. A comparison of the workings of SERP and SHARP is necessary to understand appellants' claims. SERP provides for two types of retirement. Under SERP, a salaried employee of Scott can retire with full benefits at age sixty-two or elect early retirement with reduced benefits at any time after reaching age fifty-five. If an employee elects early retirement under SERP, the employee's pension benefits are reduced by 5% for each year that the employee is under age sixty-two. The SHARP plan, *inter alia*, eliminated the 5% per year penalty and allowed early retirement at age fifty-two. Thus, SHARP provided a far more attractive plan of early retirement than that otherwise available under SERP. SHARP was

implemented to encourage early retirement at certain Scott facilities and thereby reduce the workforces at those facilities. Accordingly, SHARP was made available only to salaried employees of those facilities who met its age and service requirements.

Appellants brought an action in the United States District Court for the Eastern District of Pennsylvania. They alleged that the adoption and implementation of SHARP violated their statutory rights under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 301-1461 (1982), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1982), as well as certain state law rights. The district court granted appellants' motion for class certification and defendants' motion for summary judgment. This appeal followed.

III. THE ERISA CLAIMS

A. *ERISA Title I*

Appellants begin with the premise that administrators of pension plans under ERISA are bound by a fiduciary duty to the beneficiaries in the administration of such plans. Appellants contend that the Retirement Board breached this duty by adopting and implementing SHARP for the benefit of Scott and not for the benefit of all SERP participants and beneficiaries.

Appellees' retort that the decision to offer SHARP to a limited number of Scott employees was a *design* decision rather than an *administration* decision. Appellants point to no ERISA provision that requires an employer to provide identical benefits to employees when the employer designs a plan. Appellees contend that the administrators of a pension plan have a fiduciary duty to the plan's participants *only* with regard to administration decisions and are bound by

no such duty with regard to design decisions. Accepting appellees' reasoning, the district court held that the Retirement Board had no fiduciary duty with respect to the adoption and implementation of SHARP.

If SHARP had been a part of SERP when SERP was implemented, SHARP would clearly be part of the *design* of the plan. Appellants ground their argument that they have been treated unequally, in violation of a fiduciary duty owed them, on the fact that SHARP was implemented as an *amendment* to SERP. Specifically, they contend that the Retirement Board breached its fiduciary duty to them by amending SERP to give the SHARP benefit to some Scott employees and not to others. Appellants argue that amending a plan is an administration decision rather than a design decision.

ERISA provides that "a person is a fiduciary with respect to a plan to the extent [that] he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A) (1982). Thus, we must determine who had the authority to design and implement SHARP. We think it clear in this action that Scott, not the Retirement Board, had the sole authority to determine who would be eligible for SHARP. The design of the SHARP plan was purely a corporate management decision. It defies common sense to suggest that a corporation must allow a retirement board to make personnel decisions such as determining which plants need fewer employees. Therefore, we find that the Retirement Board had no authority to alter the terms of SHARP or to refuse to adopt SHARP. Accordingly, we agree with the district court that although the Retirement Board was the entity that formally amended SERP to adopt SHARP, the Retirement Board had no fiduciary duty with respect to the adoption of SHARP.

Similarly, we find no breach of fiduciary duty in the Retirement Board's implementation of SHARP. Appellants' attack on the implementation takes two tracks: 1) the implementation of SHARP improperly benefitted Scott and 2) the implementation of SHARP improperly benefitted only *some* SERP beneficiaries. The first contention is easily dismissed: although a fiduciary has a duty to act for the exclusive benefit of trust beneficiaries, ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (1982), the fact that a fiduciary's action incidentally benefits an employer does not necessarily mean that the fiduciary has breached his duty. Appellants suggest that Scott was using SERP participants' money -- the SERP surplus -- to fund SHARP for the benefit of Scott, i.e., to make Scott's operation more efficient. From this premise, appellants attempt to show that the Retirement Board's implementation of SHARP was not for the exclusive benefit of trust beneficiaries. This contention ignores the fact that Scott funded and will continue to fund SERP. The only benefit received by Scott was the indirect benefit of enhanced efficiency. Appellants have cited no binding case law suggesting that such consequential benefit to an employer is impermissible under ERISA. Use of the SERP surplus to pay SHARP benefits in no way decreases either appellants' rights under SERP or Scott's obligation to fully fund SERP. Thus, appellants fail in their argument that the Retirement Board improperly diverted funds to Scott's benefit.

Appellants' argument that the implementation of SHARP improperly benefitted only some of SERP's participants is answered by our conclusion that the Retirement Board had no authority to specify the plants at which employees would be eligible for SHARP. Without such authority, there is no fiduciary duty. Similarly, appellants' contention that the Retirement

Board violated the express terms of SHARP has no merit. Appellants note that SHARP provides that SHARP is to be made available "in a non-discriminatory manner." Discrimination is the disparate treatment of those who are similarly situated. Before the adoption of SHARP, Scott determined which of its plants were overstaffed and which were "lean." Thus, Scott classified its employees into two categories; the Retirement Board had no authority to alter the makeup of those categories. Employees at overstaffed plants and employees at "lean" plants are not similarly situated. Accordingly, we find that the Retirement Board did not breach the express language of SHARP by offering SHARP only to employees at plants that Scott found to be overstaffed.[1]

B. *ERISA Title II*

Appellants contend that SERP as amended by SHARP is a "top-heavy" plan within the meaning of the Internal Revenue Code. *See* I.R.C. § 416(g) (1982). If true, a loss of tax benefits would result. Citing the four-factor analysis of *Cort v. Ash*, 422 U.S. 66, 78 (1975), appellants argue that this fact gives them an implied cause of action for a violation of Title II of ERISA.

The district court rejected this claim as not properly before it. In so doing, the district court noted that appellants had raised this claim for the first time in their motion for summary judgment. Accordingly, the district court rejected the claim as outside the scope of the pleadings as well as not a matter of record. Citing *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134 (1985), the district court stated that even if

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1. In light of this conclusion, we need not address the district court's finding that the "non-discriminatory" language of SHARP was included solely for tax considerations.

the plaintiffs were given the opportunity to incorporate this claim in an amended complaint, the claim would fail.

Assuming, without deciding, that appellants' claim was appropriately before the district court, we find no merit in the claim. Appellants cite no provision of ERISA indicating that the creation of a top-heavy plan violates ERISA. The mere fact that ERISA sets forth requirements for qualification of plans does not lead one to conclude that the failure of a plan to meet these requirements is a "violation" of ERISA. Even assuming, *arguendo*, that the creation of a top-heavy plan violates ERISA, the application of the *Cort* test suggests that no private cause of action should be implied in this case. Two of the four *Cort* factors support appellants' claim: appellants are members of the class for whose benefit ERISA was enacted and ERISA's preemptive effect indicates that there is no state-law impediment to implying a remedy. However, the remaining two *Cort* factors -- legislative intent and consistency with the legislative scheme -- militate against appellants' claim.

In *Russell*, the United States Supreme Court stated that "unless [the] congressional intent [to provide an implied private cause of action] can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." 473 U.S. at 145 (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981)). The *Russell* Court concluded that the civil enforcement provisions of section 502(a) of ERISA provide strong evidence that Congress did not intend to authorize other remedies for ERISA violations that it did not incorporate expressly. *Id.* at 145-48. While the *Russell* Court was deciding a type of claim different from that in the instant case, we find the Court's statements

regarding the comprehensive remedial structure of ERISA instructive. Accordingly, we find it inappropriate to imply a private cause of action under ERISA for the creation of a top-heavy plan. In so holding, we express no opinion as to whether appellants produced sufficient evidence to suggest that SHARP was, in fact, topheavy.

IV. THE ADEA CLAIMS

Appellants also contend that the adoption and implementation of SHARP violates ADEA. This contention is without merit. ADEA proscribes discrimination based on age. Appellants are ineligible for SHARP because of the locations in which they work, not because of their ages.

Appellants attempt to argue that SHARP had a discriminatory impact because some employees who were eligible for SHARP were younger than the employees who were ineligible for SHARP. Without more, this does not support a finding of discrimination. Arguably, *any* early retirement incentive program gives more benefit to younger workers than to older ones. While appellants argue that alternative plans would be more fair to all SERP participants, appellants fail to allege facts sufficient to show any discrimination or discriminatory impact related to age. Thus, their ADEA claims fail.

V. THE STATE LAW CLAIMS

In addition to their federal statutory claims, appellants made several state law claims. Having disposed of the plaintiffs' federal claims, the district court dismissed the plaintiffs' state claims without prejudice. The district court reasoned that it was appropriate to dismiss the state claims because the federal claims had been dismissed before trial. Appellants contend that the claim of appellant Owens

should not be dismissed if appellants' federal claims are remanded. Because we affirm the district court's grant of summary judgment on appellants' federal claims, we do not find that the district court abused its discretion when it dismissed the state law claims. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).

VI. CONCLUSION

In light of the foregoing discussion, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER DATED MARCH 6, 1987 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 86-2955

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program

VS.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN

MEMORANDUM OPINION AND ORDER

MARCH 6, 1987

WEINER, J.

Plaintiffs brought this action alleging that defendant Scott Paper Company's ("Scott") early retirement plan violates their statutory rights under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 *et seq.* and violates certain state law rights. Before the court were the parties' cross-motions for summary judgment. In a

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Memorandum Opinion and Order dated January 14, 1987, we granted the motion of the defendants for summary judgment as to the federal claims, entered judgment in favor of the defendants and against the plaintiffs on the federal claims and dismissed the remaining state claims of plaintiffs without prejudice. Presently before the court is the motion of the plaintiffs to reconsider our Memorandum Opinion and Order dated January 14, 1987. After careful reconsideration, we affirm our Memorandum Opinion and Order dated January 14, 1987.

In their motion for reconsideration, plaintiffs set forth three grounds, each of which they assert should compel us to vacate our previous order. In the first ground, plaintiffs contend that in our Memorandum Opinion of January 14, we failed to address certain language contained in both the Scott Paper Company Retirement Plan for Salaried Employees ("the Plan") (Exhibit A to the parties' Stipulation of Facts) and the Scott Highly Accelerated Retirement Program ("SHARP") (Exhibit B to the parties' Stipulation of Facts). Specifically, plaintiffs direct our attention to paragraph 9.5 of the Plan which provides:

> Any discretionary acts to be taken under the Plan by the Board of Directors or by the Retirement Board with respect to classification of employees, contributions or benefits shall be uniform in their nature and applicable to all those persons similarly situated, and no discretionary act shall be taken which shall be discriminatory under the provisions of Section 401(a) of the Code.

Plaintiffs also direct our attention to paragraph two of SHARP which provides in pertinent part:

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> The provisions of this Scott Highly Accelerated Retirement Program (the "Program") shall be extended only to such business units, with such eligibility dates, during such election periods, and with such initial retirement opportunity dates, as may be designated by the Retirement Board in its sole discretion, such discretion to be exercised in a nondiscriminatory manner; . . .THE RETIREMENT BOARD MAY WITHHOLD THE OFFERING OF THE PROGRAM TO OTHERWISE ELIGIBLE HIGHLY COMPENSATED MEMBERS OF THE SCOTT PLAN FROM A DESIGNATED BUSINESS UNIT, EITHER PROSPECTIVELY OR RETROACTIVELY, IF THE RETIREMENT BOARD DETERMINES, IN ITS SOLE DISCRETION, THAT SUCH WITHHOLDING IS DESIRABLE TO ENSURE THAT THE PROGRAM IS OFFERED TO A NONDISCRIMINATORY CROSS-SECTION OF THE MEMBERS OF THE SCOTT PLAN . . ." (emphasis added, as set forth by plaintiffs in their motion for reconsideration).

Plaintiffs argue that it is evident from the language contained in the two above paragraphs that the actions of Scott and the Retirement Board in not extending the SHARP benefits across the board in a non-discriminatory manner to all employees in the Salaried Employees Pension Plan were not done in accordance with the terms of the Plan.

There is no language contained in paragraph 9.5 of the Plan which obligated either Scott or the Retirement Board to extend

the SHARP benefits "across the board" to all Scott facilities. While paragraph 9.5 does state that any discretionary acts to be taken by the Board of Directors or by the Retirement Board regarding classification of employees and contributions of benefits shall be uniform in their nature, the paragraph goes on to state that such uniform treatment is to be applied to all those persons *similarly situated.* There is no question that at the time the SHARP program was designed, Scott's salaried employees were not similarly situated. Some of Scott's salaried employees were employed at facilities which Scott considered to be overstaffed and inefficient, while others were employed at facilities which Scott considered to be "lean" and efficient. *See* Deposition of Owen G. Davis at 83-84. Accordingly, SHARP was designed so as to offer early retirement benefits to salaried employees at those facilities where head count reductions would increase efficiency but such additional benefits were not to be offered to salaried employees at facilities where efficiency would thereby be impaired. *Id. See also* Stipulation of Facts at paragraph 11. Indeed, were it not for the fact that the Scott salaried employees were dissimilarly situated, there would have been no need for Scott to design SHARP in the first place. *Id.* We, therefore, find that neither Scott nor the Retirement Board failed to act in accordance with paragraph 9.5 of the Plan when they did not extend the SHARP benefits "across the board."

With regard to paragraph two of SHARP, we note that in their motion for summary judgment, plaintiffs argued that the Retirement Board exercised absolutely no discretion in selecting the business units to which SHARP was to be extended, but rather merely rubber-stamped its approval of a plan which not only was designed by Scott's management personnel but also provided for direct and substantial personal benefits for high management employees, members of the executive committee and two of its

members. Plaintiffs contended that by not exercising its discretion, the Retirement Board failed to act in accordance with the following language contained in paragraph two of SHARP:

> The provisions of this Scott Highly Accelerated Retirement Program shall be extended only to such business units, with such eligibility dates, during such election periods, and with such initial retirement opportunity dates, as may be designated by the Retirement Board in its sole discretion, such discretion to be exercised in a nondiscriminatory manner . . .

In rejecting this argument, we noted that the above language was included in SHARP merely to give the Retirement Board discretion to adjust the SHARP program in order to insure that SHARP conformed to the non-discrimination provisions of Section 401 of the Internal Revenue Code.

Having failed under the above language contained at the beginning of paragraph two, plaintiffs now direct our attention to additional language contained in paragraph two which they claim the Retirement Board failed to act in accordance with, when it allegedly merely rubber-stamped its approval of SHARP.[1]

However, a careful review of this additional language reveals that it simply reinforces the language contained at the beginning of paragraph two which we have already found was included in sharp to insure that sharp confirmed to the non-discrimination provisions of Section 401 of the Internal Revenue code. We, therefore, find plaintiff's reliance on this additional language to be misplaced as well.

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1. See the capitalized language contained on page 3 of this Memorandum Opinion.

In their second ground for reconsideration, plaintiffs contend that in our Memorandum Opinion of January 14, 1987, we failed to "address the issue of whether the SHARP Plan was top heavy based upon the Court's view of the pleadings and the Motion for Summary Judgment resulting in the conclusion that the issue had not been properly raised in the pleadings." Plaintiffs' Motion for Reconsideration at p. 3. In their motion for summary judgment plaintiffs contended that defendants violated Title II of ERISA by designing and implementing a top heavy retirement plan. Although plaintiffs recognized that ERISA does not expressly authorize a private cause of action for an employer's violation of Title II of ERISA, plaintiffs, relying on the four-factor analysis employed by the United States Supreme Court in *Cort v. Ash,* 422 U.S. 66, 78 (1975) argued that such a cause of action should be implied.

However, in our Memorandum Opinion of January 14, 1987, we found that since plaintiffs raised this claim "for the very first time in their motion for summary judgment" and since the plaintiffs made no effort to support the claim in any of "the depositions, interrogatories, admissions on file or affidavits" the claim had to be rejected as "being outside the scope of the pleadings as well as not a matter of record" Opinion at p. 15.

In their motion for reconsideration, plaintiffs contend that they "should be given the opportunity to amend the complaint to clearly state the issue since it has been raised and addressed by both parties in all the pleadings and motions filed in this case including the initial motion filed by the defendant to dismiss and the parties' action for Summary Judgment." Plaintiffs' Motion for Reconsideration at p. 3.

In representing that the "top heavy" issue has been raised

and addressed by both parties in all the pleadings and motions filed in this case, plaintiffs have mischaracterized the state of the pleadings. Plaintiffs did not raise the top heavy claim until after the pleadings were closed, discovery had been completed and the parties had jointly filed a Stipulation of Facts. Under such circumstances we do not believe plaintiffs should be given the opportunity to "clearly state the issue" in an amended complaint.

Even if the "top heavy" claim is properly before us or plaintiffs are given the opportunity to amend their complaint to incorporate such a claim, the claim would still have to be rejected.

In *Massachusetts Mutual Insurance Co. v. Russell,* 105 S.Ct. 3085 (1985), the United States Supreme Court refused to find that a private right of action for extra-contractual damages under ERISA should be implied when the statute itself did not expressly provide for such a remedy. In reaching its decision, the Court relied on the same four-factor analysis contained in *Cort v. Ash, supra* which plaintiffs urge us to apply in the case *sub judice,* and found that two of the factors — legislative intent and consistency with the legislative scheme — were not consistent with the theory of a private right of action for extra-contractual damages under ERISA. The Court, quoting language in *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 94 (1981), stated that "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist."

In the case *sub judice,* neither the language nor the statutory structure of ERISA convey any Congressional intent to allow a private right of action for an employer's violation of Title II of ERISA. Certainly, if Congress had intended to recognize a private

action for an employer's violation of Title II of ERISA it would have included such a right in the statutory scheme. Moreover, we do not believe that Congress inadvertently omitted such a private right of action. As stated by the Supreme Court in *Russell,* the assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." *Russell, supra,* quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

Finally, plaintiffs contend that in our Memorandum Opinion of January 14, 1987, we failed to address the issue of "whether or not the company can dictate the use of the surplus held in a pension fund for the purpose of carrying out corporate policy when the company does not separately and independently fund the proposed change in the pension plan."

As they did with their "top heavy" claim, plaintiffs raised the concept of a "misuse of surplus" for the very first time in their motion for summary judgment — after the pleadings were closed, discovery had been completed and the parties had jointly filed a Stipulation of Facts. In their motion for summary judgment the plaintiffs contended that the defendants breached their fiduciary duties under section 404 of ERISA, 29 U.S.C. §1104(a)(1)(A) by failing to act solely in the interest of all the participants of the Plan. Specifically, plaintiffs asserted in a conclusory manner that "there is no dispute that the defendants used the surplus funds in the plaintiffs' pension plan for the benefit of SCOTT PAPER COMPANY and not solely for the benefits of all of its participants and beneficiaries." Plaintiffs' Motion for Summary Judgment at p. 17. The plaintiffs went on to assert that the defendants accomplished the goal of making Scott more

cost competitive "not by conducting a general layoff or by funding an early retirement program out of its cash drawer, but rather by modifying the eligibility standards of the existing retirement plan, offering early retirement to a select few, and paying the costs of this plan from the employees pension plan." Plaintiffs' Motion for Summary Judgment at p. 17. The plaintiffs went on to assert in an even more conclusory fashion that "this cost reduction follows shortly after Scott increased its long term debt by over $500,000,000 and its interest payments by over $15,000,000. Management thereby prevented a hostile takeover and possible management replacement and rewarded itself with stock options. Scott could not borrow this money from the pension fund, §406(a)(1)(B) and therefore embarked on a scheme to accomplish the same result, interest free, by an early retirement program." Plaintiffs' Motion for Summary Judgment at p. 18.

There are absolutely no facts contained anywhere in the record to support these wild assertions by plaintiffs. Indeed, there could not be since plaintiffs raised the "misuse of surplus" issue for the first time in their motion for summary judgment. Moreover, we fail to see how the plaintiffs could be adversely affected by the use of a surplus since the plaintiffs have stipulated that their accrued benefits and their rights to payment of these benefits were *not* altered *in any way* by the adoption of SHARP. Stipulation of Facts at paragraph 16. (emphasis added). We, therefore, reject plaintiffs' "misuse of surplus" claim.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 86-2955

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program

VS.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN

MARCH 6, 1987

ORDER

After careful reconsideration, we AFFIRM our Memorandum Opinion and Order of January 14, 1987.

IT IS SO ORDERED.

s/ Charles R. Weiner
CHARLES R. WEINER

APPENDIX B — MEMORANDUM OPINION AND ORDER DATED JANUARY 14, 1987 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 86-2955

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program

VS.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN

MEMORANDUM OPINION AND ORDER

WEINER J. JANUARY 14, 1987

Plaintiffs brought this action alleging that defendant Scott Paper Company's ("Scott") early retirement plan violates their statutory rights under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 *et seq.* and violates certain state law rights. Presently before the court are the parties' cross-motions for summary judgment and a motion by the plaintiffs for class certification. For the reasons which follow, the motion for class certification is granted, the

motion of the defendant for summary judgment is granted and the motion of the plaintiff for summary judgment is denied.

The parties have stipulated to the following facts:

1. Plaintiff James C. Trenton, Sr. ("Trenton") is a resident of the Commonwealth of Pennsylvania. On December 31, 1985, Trenton was 59 years old and a salaried employee of Scott at Scott's Chester Plant, which is located in Chester, Pennsylvania.

2. Plaintiff Frederick A. Ringbloom ("Ringbloom") is a resident of the Commonwealth of Pennsylvania. On December 31, 1985, he was 58 years old and a salaried employee at Scott's Chester Plant. Before becoming a salaried employee, Ringbloom had been an hourly employee at Scott.

3. Plaintiff Harry G. Barlow ("Barlow") is a resident of the Commonwealth of Pennsylvania. On December 31, 1985, Barlow was 55 years old and a salaried employee at Scott's Chester Plant.

4. Plaintiff Earl L. Owens ("Owens") is a resident of the Commonwealth of Pennsylvania. On December 31, 1985, Owens was 56 years old. He had worked for Scott at the Chester Plant in a salaried position until April 1, 1986, when he retired with a pension under the terms of the Scott Paper Company Salaried Employees Retirement Plan (the "Plan").

5. Defendant Scott is a corporation organized under the laws of the Commonwealth of Pennsylvania with corporate offices located at Scott Plaza, Philadelphia, Pennsylvania. Scott is the sponsor of a number of employee benefits plans, including the Plan.

6. Defendant Retirement Board of Scott Paper Company (the "Retirement Board") is the managing board of the Plan and as such is responsible for the general administration of the Plan.

7. The Plan is a defined benefit pension plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"). It was first adopted by Scott in 1945 and has been amended a number of times since then. The Plan is qualified under the Internal Revenue Code ("IRC").

8. The Plan provides to Scott salaried employees in the United States the opportunity to earn retirement and other benefits on the terms and conditions set forth in the Plan.

9. Among other benefits, the Plan offers participants who have earned at least 15 years of credited service the opportunity to take early retirement after reaching age 55.

10. The Plan does not provide benefits for Scott's current hourly production workers, who are covered by separate retirement plans, which are not at issue in this litigation.

11. In early 1986, Scott designed an accelerated retirement program known as the Scott Highly Accelerated Retirement Program ("SHARP"). The purpose of the program was to provide an incentive to salaried employees at certain designated facilities including corporate staff to retire early in order to reduce the salaried work force at those facilities. On March 25, 1986, Scott caused the Plan to be amended to adopt SHARP.

12. SHARP offered an early retirement benefit to certain Plan participants at designated Scott facilities. Those participants who were employed at the designated facilities were given the

option of retiring with an enhanced pension if they had reached age 52 and completed at least 15 years of credited employment at Scott on or before December 31, 1985. SHARP also permitted persons who had retired from employment at one of the designated facilities during 1986 but before the implementation of SHARP to take advantage of SHARP. The latest date by which eligible participants could choose to participate in SHARP was either April 15 or 30, 1986, depending on their location.

13. Participants eligible for benefits under the Plan and SHARP have received benefits in accordance with the terms and conditions of the Plans.

14. The participating or designated facilities under the SHARP Program were: 1) Natural Resources Division Staff; 2) Northwest Woodlands; 3) Southern Woodlands; 4) Northeastern Woodlands; 5) Mobile River Saw Mill; 6) Scott Paper International Staff (excluding expatriates); 7) Corporate Staff; 8) Nonwovens Division Staff; 9) The Landisville and Rogers facilities; 10) International Trade Venture Staff; 11) Packaged Products Division Staff (including Technology); 12) the entire Packaged Products Division Field Sales force; and 13) the following Packaged Products Division production facilities: Dover (Del.), Fort Edward (N.Y.), Marinette (Wis.), Milwaukee (Wis.), Oconto Falls (Wis.), and Winslow (Me.). Scott Paper facilities not designated for the purpose of SHARP are: 1) Chester (Pa.) (Packaged Products Division); 2) Everett (Wash.) (Packaged Products Division); 3) Mobile (Ala.) (Packaged Products Division and S.D. Warren); 4) the S.D. Warren Division Staff and 5) the S.D. Warren facilities at Westbrook (Me.) (including technology), Muskegon (Mich.), and Somerset (Me.).

15. The four plaintiffs were not eligible to participate in SHARP.

16. Plaintiffs Trenton, Ringbloom, Barlow and Owens have earned benefits under the Plan through their service with Scott. Their accrued benefits and their right to payment of these benefits under the Plan were not altered in any way by the adoption of SHARP.

17. The named plaintiffs filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"), with respect to Scott's adoption of SHARP, on the following dates: Trenton filed a charge on July 7, 1986; Ringbloom, Barlow and Owens filed a charge on July 22, 1986. Trenton contends he attempted to file charges of discrimination with the EEOC on April 19, 1986.

The plaintiffs have moved for an order determining that this action shall be maintained as a class action on behalf of the class of employees of Scott Paper Company excluded from participation in the Highly Accelerated Retirement Program. Since the defendants have not filed a brief in opposition within the time provided by Local Rule 20(c), we shall treat the motion as uncontested.

Rule 23(a) of the Federal Rules of Civil Procedure provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims

> or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

A litigant who wishes to bring a class action must satisfy all of the conditions of 23(a) and then he must also convince the court that his action is appropriate under one of the three subdivisions of 23(b).

In the case *sub judice*, the class is estimated to consist of approximately 500 employees of Scott who were excluded from participating in the SHARP program. "The numerosity test is one of practicability of joinder. Impracticability is a subjective determination based on number, expediency, and inconvenience of trying individual suits." *Pabon v. McIntosh,* 546 F.Supp. 1328, 1333 (E.D. Pa. 1982). We find that the plaintiffs have satisfied the numerosity prerequisite of the rule.

Commonality is the next prerequisite to be considered. The common issues to the class include whether defendants violated ERISA by excluding the plaintiffs and members of the class from participation in the SHARP program; and whether the defendants discriminated against the plaintiffs and members of the class in violation of the ADEA. We find that the commonality issue has been satisfied.

The next prerequisite is whether the claim of the plaintiffs are typical to those of the class. This requirement is intended to insure that the class members' claims are presented fully and vigorously prosecuted, and that there be no conflict between the plaintiffs' interests with those of the class. *Sley v. Jamaica Water and Utilities, Inc.,* 77 F.R.D. 391, 394 (E.D. Pa. 1977). We find that the plaintiffs' claims are typical of those of the class.

Plaintiffs' claims do not have to be identical to those of the class, - they must be similar enough to convince the court that the absent members' claims will be fully presented. *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 691-2 (E.D. Pa. 1977).

The final issue to be considered is whether plaintiffs will adequately protect the interests of the class. The plaintiffs' interests must not be antagonistic to those of the class, and plaintiffs' attorneys must be qualified and capable of conducting the litigation. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975). We find that the plaintiffs have no interests antagonistic to the class, and that the attorneys are experienced in class action litigation and are able to conduct the class litigation. We find that this final prerequisite has been satisfied.

Our next inquiry is whether the action is appropriate under one of the three subdivisions of 23(b). Rule 23(b)(3) provides that a class action may be maintained if 23(a) is satisfied, and the court finds that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for a fair adjudication of the controversy. We find that the elements of Rule 23(b)(3) have been satisfied, in that there are common questions of law or fact which predominate in this litigation, and the class action is superior to any other method of resolving the controversy.

We, therefore, grant the motion of the plaintiffs for class certification.

In considering a motion for summary judgment, we must determine whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

show there is no genuine issue as to any material fact, and whether the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). *Arnold Pontiac-GMC, Inc. v. General Motors Corporation,* 786 F.2d 564, 568 (3d Cir. 1986); *Fragale & Sons Beverage Co. v. Dill,* 760 F.2d 469, 472 (3d Cir. 1985); *Wolk v. Saks Fifth Avenue, Inc,* 728 F.2d 221, 224 (3d Cir. 1984); *First Jersey National Bank v. Dome Petroleum Limited,* 723 F.2d 335, 338 (3d Cir. 1983). The movant has the burden of demonstrating that there are no genuine issues of material fact and all reasonable inferences from the record must be drawn in favor of the non-moving party. *Gans v. Mundy,* 762 F.2d 338, 340 (3d Cir. 1985); *United States v. Athlone Industries, Inc.,* 746 F.2d 977, 981-82 (3d Cir. 1984); *Small v. Seldows Stationary,* 617 F.2d 992, 994 (3d Cir. 1980).

In view of the parties' stipulation of facts this court finds that there are no genuine issues of material fact and therefore this case is suitable for summary disposition.

In their motion for summary judgment, plaintiffs essentially allege violations of ERISA Title I, ERISA Title II, the ADEA and a common law breach of agreement claim. We now address these four claims in seriatim.

Before we consider plaintiffs' claim under Title I of ERISA, we must point out that a plaintiff can only succeed under Title I of ERISA if he can show that his asserted rights arise under a specific ERISA provision, rather than allegedly arising out of some principle of "federal common law." As stated by the United States Court of Appeals for the Third Circuit in *Van Orman v. American Insurance Co.,* 680 F.2d 301, 312 (3d Cir. 1982), an ERISA case:

> . . .Where Congress has [thus] established an extensive regulatory network and has expressly announced its intention to occupy the field, Federal courts will not lightly create additional rights under the rubic of federal common law.

Thus, the central question becomes whether plaintiffs can point to any provision of ERISA Title I that confers upon them a statutory right to be included in the SHARP program.

The only provision of Title I of ERISA upon which plaintiffs rely is Section 404(a)(1), 29 U.S.C. §1104(a)(1)(A). The key to their claim under §404(a)(1) is the following language contained in paragraph two of SHARP:

> The provisions of this Scott Highly Accelerated Retirement Program shall be extended only to such business units, with such eligibility dates, during such election periods, and with such initial retirement opportunity dates, *as may be designated by the Retirement Board in its sole discretion, such discretion to be exercised in a nondiscriminatory manner* . . .(emphasis supplied)

Plaintiffs contend that the Retirement Board exercised absolutely no discretion in selecting the business units to which SHARP was to be extended, but rather merely rubber-stamped its approval of a plan which not only was designed by Scott's management personnel but also provided for direct and substantial personal benefits for high management employees, members of the executive committee and two of its members. The plaintiffs argue that by simply adopting the SHARP plan on the recommendation of Scott's senior management, the defendants breached their fiduciary duties by failing to act solely in the interest of all of the participants of the plan and by failing to independently appraise the merits

of the SHARP plan in violation of Section 404(a)(1) of ERISA, 29 U.S.C. §1104. For the reasons which follow, we find that section to be inapplicable.

At the outset, we note that plaintiffs' reliance on the language contained in paragraph two of SHARP is misplaced. Defendants contend, and plaintiffs do not refute, that this language was included in the SHARP amendment to the basic Scott retirement plan on March 24, 1986, some two and one half weeks *after* the Chief Executive Office of Scott had already announced the SHARP program, including his own managerial decision to exclude certain locations from participating in SHARP. Defendants also contend, and again plaintiffs do not refute, that the purpose of this language was "to give the Retirement Board a certain amount of 'discretion' to fine-tune the SHARP program to insure that it conformed to the nondiscrimination provisions of Section 401 of the Internal Revenue Code." See Deposition ot Robert Welsh at 66-67. Thus, the language upon which plaintiffs rely so heavily appears to be nothing more than "window dressing" to satisfy the provisions of the Internal Revenue Code. Indeed, once the SHARP program had been designed at a higher level and delivered to the Retirement Board merely for the purposes of formal adoption on March 24, 1986, the Retirement Board members had no choice but to accept the managerial design decision.

Even if the Retirement Board was bound by the language of paragraph two of SHARP to independently appraise the merits of the SHARP plan, its failure to do so is not subject to judicial review under §1104(a)(1)(A).

29 U.S.C. §1104(a)(1)(A) provides:

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§1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan.

The definition of a fiduciary is contained in §3(21)(A) of ERISA, 29 U.S.C. §1002(21)(A). That provision provides:

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

> Such term includes any person designated under section 1105(c)(1)(B) of this title.

In the case *sub judice*, the parties have stipulated that the Retirement Board is responsible for the general administration of the Plan. However, the administrator of a plan is a fiduciary only to the extent he is engaged in administration. *United Independent Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1262, 1268 (7th Cir. 1985). Thus, the court in *United* found that the tasks of administration do not extend to negotiating the terms of a governing collective bargaining agreement. In reaching this conclusion, the *United* court found the following language in *Sutton v. Weirton Steel Division of National Steel Corp.*, 567 F.Supp. 1184, 1201 (N.D. W.Va.), *aff'd* 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984) to be persuasive:

> [N]egotiations that affect the terms and conditions of future pension benefits (at least those that are not protective by ERISA's vesting and non-forfeitability provisions), do not implicate fiduciary duties as to the pension fund. Such negotiations are distinct from actually administering a plan and conducting transactions affecting the monies and property of the plan's fund. In other words, the mere fact that a company has named itself as pension plan administrator or trustee does not restrict it from pursuing reasonable business behavior in negotiations concerning pension benefits not otherwise affected by the requirements of ERISA. When the terms of the pension agreement are negotiated by a labor organization and the employer and ultimately controlled by a collectively bargained agreement, as here, the

> distinction between administering the pension program (under a fiduciary duty) and creating or amending the program through negotiations is even more clear.

Sutton, 567 F.Supp. at 1201.

Likewise, in the case *sub judice*, we believe that the tasks of administration do not extend to decisions regarding which business units should be included in a retirement program. Such decisions, like negotiations that affect the terms and conditions of future pension benefits, are distinct from actually administering a plan and conducting transactions affecting the monies and property of the plan's fund. On the contrary, decisions regarding which business units should be included in a retirement program are more akin to decisions regarding the establishment of a plan and decisions concerning which benefits should be included in a plan, neither of which are subject to judicial review. *See Moore v. Reynolds Metals Co.*, 740 F.2d 454 (6th Cir. 1984). Thus, even if it was the responsibility of the Retirement Board to determine which business units SHARP would be extended to, in the course of making such a determination the Board would not be acting as a fiduciary within the meaning of §1104(a)(1)(A). Fiduciary duties do not begin until the terms at issue are incorporated into a plan. *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986). We, therefore, find §1104(a)(10A) to be inapplicable.

Relying on the four-factor analysis employed by the United States Supreme Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975), plaintiffs argue that a private cause of action for an employer's violation of Title II of ERISA should be implied even if it is not expressly authorized by ERISA. Specifically, plaintiffs contend that defendants have violated Title II of ERISA by designing and

implementing a top heavy retirement plan. However, since this claim is not properly before us, it must be rejected.

In ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, we must determine whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 568 (3d Cir. 1986).

In the case *sub judice*, plaintiffs have raised their claim that the Scott Retirement Plan is "top heavy" for the very first time in their motion for summary judgment. Nowhere in their complaint or even in their answer to defendant's motion to dismiss do they raise such a claim. Moreover, there is nothing in the depositions, interrogatories, admissions on file or affidavits to support such a claim. We, therefore, reject this claim of plaintiffs as being outside the scope of the pleadings as well as not a matter of record.

With regard to plaintiffs' claim under the ADEA we note that the SHARP program provided that a salaried employee had to meet the following three criteria in order to be eligible: (1) attained the age of 52 on or before December 31, 1985; (2) completed 15 years of credited employment at Scott by that same date; (3) be employed at one of the designated facilities. Stipulation at paragraph 12. Each of the four named plaintiffs met the first two requirements, but because none of them was employed at a designated facility, none of them was eligible to participate in the SHARP program. Thus, since it was their physical location rather than their age which prevented the four named plaintiffs from participating in SHARP, we fail to see any basis for a claim under the ADEA. Plaintiffs, however, have attempted to assert a claim under the ADEA by arguing that defendants have violated

the ADEA by including "in the SHARP program employees 52 to 55 years of age who are not otherwise eligible for participation in the Scott Paper Salaried Employees Retirement Plan while at the same time excluding the majority of employees 55 years of age or older otherwise eligible for the program and employed at excluded facilities." Defendants respond to this argument by asserting the bona fide employee benefit plan defense under 29 U.S.C. §623(f)(2). Plaintiffs reply that the SHARP plan does not qualify under the "bona fide" retirement plan exception to the ADEA because "the Retirement Board ostensibly has the discretion to provide the benefits to certain groups of employees" and because "the SHARP plan has not been applied to employees of the same age."

In order "to promote employment of older persons based on their ability rather than age" and to discourage the common practice of "setting of arbitrary age limits regardless of potential for job performance" [29 U.S.C. §621], Congress by the Act of December 5, 1967, 81 Stat. 603, 29 U.S.C. §623(a) provided that:

> It shall be unlawful for an employer . . . .to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

However, Congress specified in 29 U.S.C. §623(f)(2) that:

> It shall not be unlawful for an employer . . .to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . .

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In establishing a Section 623(f)(2) defense, the burden is on the defendants to demonstrate the existence of three elements: (1) defendants must have been acting in observance of the terms of (2) a bona fide employee benefit (3) which is not a subterfuge to evade the purposes of the ADEA. *E.E.O.C. v. Westinghouse Elec. Corp.*, 725 F.2d 211, 223 (3d Cir. 1983).

With regard to the first requirement, no contention has been made that this requirement has not been complied with. With regard to the second requirement, we find the SHARP plan to constitute a bona fide employee benefit plan even under the stringent standards enunciated in *Westinghouse, supra*. In *Westinghouse*, the United States Court of Appeals for the Third Circuit stressed the importance of the words "such as retirement, pension or insurance" contained in §623(f)(2) and noted that "[e]ven though these words are descriptive, their description contains substance. These words are to be interpreted as indicative of the *types* of plans in which Congress intended to allow age discrimination; they are of the type whereby the cost of benefits increases with age." *Westinghouse* at 224. Unlike the plan at issue in *Westinghouse* the benefits of which were based solely on an employee's length of service and the occurrence of a layoff, the SHARP plan is indeed a retirement plan, the benefits of which are based not only on an employee's length of service but also on age-related cost factors (to be eligible an employee must have attained the age of 52). We, therefore, find the SHARP plan to be a bona fide plan within the language of §623(f)(2).

Turning to the final requirement for a defense under §623(f)(2) that the plan must not be a subterfuge to evade the purposes of the statute, we note the cases illustrate that a plan is typically branded as a subterfuge to evade the provisions of the statute when the benefits payable are "unreasonably infinitesimal."

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Patterson v. Independent School Dist #709, 742 F.2d 465, 466 (8th Cir. 1984). *Zinger v. Blanchette*, 549 F.2d 901, 909 (3d Cir. 1977). In the case *sub judice*, there is absolutely no evidence indicating that the benefits payable under SHARP are so unreasonably infinitestimal as to brand the plan a subterfuge for purposes of evading the ADEA. On the contrary, the parties have stipulated that the purpose of SHARP was to provide an incentive to salaried employees at certain designated facilities including corporate staff to retire early in order to reduce the salaried work force at those facilities. Stipulation at paragraph 11. Having found that the SHARP plan meets all the requirements specified under §623(f)(2), we find the plan to be exempt from the age discrimination prohibitions imposed by other portions of §623. Indeed the typical retirement plan inevitably takes account of age. See *United Air Lines v. McMann,* 434 U.S. 192, 207 (1977) (Mr. Justice White concurring opinion) ("all retirement plans necessarily make distinctions based on age") and *Zinger v. Blanchette*, 549 F.2d 901, 910 (3d Cir. 1977), ("there is obviously discrimination because of age . . .in any retirement plan, voluntary or involuntary. But that discrimination, existing because of the terms of a bona fide retirement plan, is exempt from the scope of the Act" (ADEA)).

Having disposed of all of plaintiffs' federal claims, the only claims that remain before us are state law claims for breach of contract, breach of the covenant of good faith and fair dealing and a claim asserted on behalf of plaintiff Owens in which plaintiffs allege that defendants breached an agreement to give Owens benefits under the SHARP program. In their motion for summary judgment, the plaintiffs only raise the breach of agreement claim concerning Owens. Since we have already disposed of all of plaintiffs' federal claims by motion for summary judgment, the question before us is whether this court may retain

pendent jurisdiction over the plaintiffs' remaining state law claims.

The doctrine of pendent jurisdiction gives a federal court power to hear a claim that has no independent basis for federal jurisdiction if the claim derives from a "common nucleus of operative fact" with a federal claim that is substantively sufficient to confer subject matter jurisdiction on the court. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). When and how pendent jurisdiction will be exercised is a matter of trial court discretion. *Gibbs, supra* at 725. That discretion is to be exercised based upon such considerations as "judicial economy, convenience, and fairness to the litigants" as well as upon comity and the desirability of avoiding unnecessary federal adjudication of state law issues. *Gibbs, supra* at 725-26.

In *Gibbs*, the Supreme Court specifically advised that, absent unusual circumstances, "if the federal claims are dismissed before trial, . . .the state claims should be dismissed as well . . .and left for resolution to state tribunals." *Id.*

In the case *sub judice*, we have already disposed of all of plaintiffs' federal claims prior to trial by summary judgment. We, therefore, in our discretion decline to retain pendent jurisdiction over the remaining state claims. *See Buethe v. Britt Airlines*, 749 F.2d 1235, 1240 (7th Cir. 1984). ("The disposal of Buethe's federal claim on a motion for summary judgment thus strongly suggests that the district court should have declined to retain pendent jurisdiction over the state law claim."); *Jackson v. Byrne*, 738 F.2d 1443, 1448 (7th Cir. 1984) (federal claims dismissed on motion for summary judgment). While there are no unsettled issues of local law involved in any of plaintiffs' common law claims as there were in *Buethe, supra*, the presence of which normally require dismissal of the state claim, we do find that the expenditure of

additional judicial effort after dismissal of the federal claims does not favor the exercise of pendent jurisdiction over the local law claim.

Turning from the issue of when the exercise of federal pendent jurisdiction should cease to the issue of *how* a decision to cease should be implemented, we note that three options are available — dismissal with prejudice, dismissal without prejudice, and remand. Since the case *sub judice* has not been removed from a state court, a remand is not an option. In deciding between the remaining two options, that is, whether to dismiss with or without prejudice, we note that the *Gibbs* court instructed that the dismissal of the state-law claims be without, rather than with, prejudice. In reaching this decision, the *Gibbs* court relied on the same considerations which the Court had previously spelled out as governing the exercise of pendent jurisdiction — considerations of comity and the desirability of preserving the state law issues for resolution by a state tribunal. Accordingly, we dismiss the remaining state claims without prejudice in order to allow plaintiffs the chance to pursue such claims in state court. While some courts have held that the dismissal of state claims is an abuse of discretion if a subsequent state court suit might be barred by the statute of limitations, *O'Brien v. Continental Illinois National Bank and Trust Co.*, 593 F.2d 54 (7th Cir. 1978), this is not a concern in the case *sub judice* since the claims arose, at the earliest in January of 1986 and thus plaintiffs would not be barred by the four year statute of limitations which governs breach of contract actions in Pennsylvania.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 86-2955

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program

VS.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN

JANUARY 14, 1987

ORDER

The motion of the plaintiffs for class certification is GRANTED.

The motion of the defendants for summary judgment is GRANTED as to the federal claims.

The motion of the plaintiffs for summary judgment is DENIED as to the federal claims.

Judgment is entered in favor of the defendants and against the plaintiffs on the federal claims.

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The remaining state claims of plaintiffs are DISMISSED without prejudice.

The motion of the defendants to dismiss is MOOT.

IT IS SO ORDERED.

s/ Charles R. Weiner
CHARLES R. WEINER

APPENDIX C — EXCERPT OF SCOTT PAPER COMPANY RETIREMENT PLAN FOR SALARIED EMPLOYEES

AMENDMENT TO EXHIBIT O, SCOTT PAPER COMPANY

RETIREMENT PLAN FOR SALARIED EMPLOYEES

III. SCOTT HIGHLY ACCELERATED RETIREMENT PROGRAM

1. Except as hereinafter set forth, any Member of the Scott Plan who (a) is actively employed as a Full-Time Employee by or on an authorized leave of absence from a designated business unit on the eligibility date for the business unit, (b) is employed by or on an authorized leave of absence from the same or another designated business unit on the first day of the election period for such business unit, (c) has completed 15 years or more of Scott Employment or Combined Employment on the eligibility date, (d) has attained age 52 on or before the eligibility date, and (e) has submitted his written application therefor during the election period for the business unit, shall be retired by the Retirement Board with (i) the Retirement Allowance, if any, to which he is then entitled, plus (ii) the enhancement to his Retirement Allowance described in Paragraph 3 below (the "Retirement Allowance Enhancement"); provided, however, that no Member shall be eligible for a Retirement Allowance Enhancement if his Retirement Allowance exceeds the maximum Retirement Allowance limitation of Section 5.10. The retirement shall be effective on the first day of the month next following receipt of the Member's written application or on such other date as may be designated by the Retirement Board (the "initial retirement opportunity date"); provided, however, that the Retirement Board may, in its sole discretion, postpone the Member's retirement to the first day of any following month not

later than twenty-four months thereafter but in no event later than January 1, 1990.

2. The provisions of this Scott Highly Accelerated Retirement Program (the "Program") shall be extended only to such business units, with such eligibility dates, during such election periods, and with such initial retirement opportunity dates, as may be designated by the Retirement Board in its sole discretion, such discretion to be exercised in a nondiscriminatory manner; provided, however, that no eligibility date shall be earlier than December 31, 1985 nor later than December 31, 1987; and provided further, that each election period shall be not less than fourteen days in duration, shall commence no earlier than April 1, 1986 and shall expire on or before December 31, 1987. The Retirement Board may withhold the offering of the program to otherwise eligible highly compensated Members of the Scott Plan from a designated business unit, either prospectively or retroactively, if the Retirement Board determines, in its sole discretion, that such withholding is desirable to ensure that the Program is offered to a nondiscriminatory cross-section of the Members of the Scott Plan. The Retirement Board, in its sole discretion, may limit the number of retirements under the Program within a designated business unit or portion thereof, and it may extend this Program to any Member of the Scott Plan who would have been eligible for the Program on the eligibility date for his business unit but for his retirement prior to commencement of the applicable election period, such discretion to be exercised in a nondiscriminatory manner.

3. The Retirement Allowance Enhancement payable pursuant to the provisions of Paragraph 1 above with respect to the retirement of a Member who has attained age 65 at the time of retirement shall equal the excess of (a) the amount computed for such Member

pursuant to Section 5.1 of the Scott Plan but with at least five bonus years added to his Credited Employment as described in Paragraph 5 below, over (b) the amount computed for such Member pursuant to Section 5.1 of the Scott Plan. The Retirement Allowance Enhancement payable pursuant to the provisions of Paragraph 1 above with respect to the retirement of a Member who has not attained age 65 at the time of retirement shall equal the excess of (a) (i) an amount computed for such Member pursuant to Section 5.2 of the Scott Plan but without reduction in his Retirement Allowance on account of his age and with up to ten bonus years added to his Credited Employment as described in Paragraph 5 below, plus (ii) an amount which is the Actuarial Equivalent of any actuarial reduction in a Retirement Allowance payable to him by any Other Retirement Plan in which he may have Credited Employment or, Credited Service, over (b) the amount, if any, computed for such Member pursuant to Section 5.2 of the Scott Plan.

4. The surviving Spouse of any Member whose retirement was postponed by the Retirement Board pursuant to Paragraph 1 above and whose employment terminates due to death after the initial retirement opportunity date but before the Member's retirement, shall be eligible to receive, in addition to the amount computed for such Spouse pursuant to Section 5.9 of the Scott Plan, a Retirement Allowance Enhancement equal to the excess of (a) the amount computed for such Spouse pursuant to Section 5.9 of the Scott Plan but without reduction on account of the Member's age and with up to ten bonus years added to the Member's Credited Employment as described in Paragraph 5 below, over (b) the amount computed for such Spouse pursuant to Section 5.9 of the Scott Plan. The surviving Spouse of any Member to whom the Program is extended (or would have been extended, but for the Member's death) by virtue of the last sentence

of Paragraph 2 above and who dies prior to the applicable initial retirement opportunity date shall receive the Retirement Allowance Enhancement described in the preceding sentence, beginning on the applicable initial retirement opportunity date.

5. The number of bonus years and months to be added to a Member's Credited Employment pursuant to the provisions of Paragraphs 3 or 4 above shall be determined on the basis of the Member's age on the initial retirement opportunity date as follows: (a) in the case of a Member who has not attained age 61, the bonus shall be the remainder obtained when the number of years and months remaining until the Member's attainment of age 62 is subtracted from ten years; (b) in the case of a Member who has attained age 61 but who has not attained age 65, the bonus shall be the number of years and months remaining until the Member's attainment of age 70; (c) in the case of a Member who has attained age 65, the bonus shall be five years; or (d) in the case of a Member whose retirement under the program is postponed by the Retirement Board pursuant to Paragraph 1 above and who had not attained age 62 by the initial retirement opportunity date, the bonus shall be the sum of the bonus determined in accordance with subparagraph (a) or (b) above, whichever is applicable, and the lesser of (i) the number of years and months between the initial retirement opportunity date and such retirement, and (ii) the number of years and months remaining between the initial retirement opportunity date and the Member's attainment of age 62.

No. 87-1489 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees of SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program,
Petitioners,

v.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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19 PP

QUESTION PRESENTED

The only question as to which the petition presents argument in favor of certiorari review may be properly stated as follows:

Where it is acknowledged that an employer enjoys the statutory right (under ERISA) to design its pension plan so as to advance the employer's business interests and be consistent with its available resources—and where an employer, seeking to induce the early retirement of certain excess employees (in order to increase efficiency), designs an amendment to its plan so as to provide extra early retirement benefits for selected employees without depriving its remaining employees of any of their pre-existing pension rights—may such remaining employees properly bring suit under ERISA to compel the employer to offer extra early retirement benefits to all employees uniformly, without regard to the employer's business needs and resources?

PARTIES TO THE PROCEEDINGS

The names of all parties in the district court and the court of appeals are listed in the caption. Respondent Scott Paper Company has the following publicly held subsidiary or affiliated companies: Scott Paper Ltd. (Canada) and Compañia Industrial de San Cristóbal, S.A. (Mexico).

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE [1]

1. Respondent Scott Paper Company ("Scott") has long maintained a number of employee benefit plans, including its basic retirement plan for salaried per-

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[1] With some hesitation respondents feel obliged to caution the Court as to the factual accuracy of petitioners' "Statement of the Case." It is devoid of record references and contains substantial errors. See notes 2, 13 *infra*.

sonnel, the "Scott Salaried Employees Retirement Plan" ("SERP"). In 1986, believing that certain of its facilities were over-staffed and that those operations could be rendered more efficient by early voluntary retirements, Scott designed and implemented a new program called the "Scott Highly Accelerated Retirement Program" ("SHARP") under which salaried employees working at the designated over-staffed locations (and meeting certain age and service requirements) would be entitled to new early retirement benefits not previously available under SERP (App. 27a-29a). Needless to say, since Scott thereby took on an obligation to provide additional funding to support SHARP, this approach to the problem of selectively reducing Scott's work force was more costly to Scott than outright firings would have been, but Scott preferred the more humane SHARP approach.[2] SHARP's benefits were not offered to employees at other company facilities which, not being over-staffed, were already operating efficiently.[3]

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[2] The staff planners at Scott recommended SHARP in preference to outright terminations because SHARP was "the most humane way of getting people to leave" the over-staffed operations. See the joint appendix filed in the court of appeals at 557. The petition is flatly wrong in its repeated assertions (at 4, 5, and 8) that "none" of the "funding for SHARP . . . came from Scott." In fact, all of it came or will come from Scott, the only possible source of such funding.

[3] The SHARP program had the desired result: a substantial number of employees at the over-staffed locations elected to take early retirement, and although Scott will have to shoulder an increase in its retirement funding costs, the net result of the SHARP program will be reduced costs and increased efficiency.

2. Petitioners are four individuals who are or were employed at a Scott facility which was not overstaffed in the relevant period. Accordingly, none of the four petitioners were or are eligible for SHARP's benefits. On the other hand, it was stipulated in the proceedings below that petitioners "have earned benefits under [SERP]" and that "[t]heir accrued benefits and their right to payment of these benefits under [SERP] were not altered in any way by the adoption of SHARP." App. 29a. Since Scott has a clear statutory obligation to keep SERP funded at levels calculated to assure payment of all of petitioners' SERP benefits, 26 U.S.C. § 412, payments made to SHARP beneficiaries can have absolutely no effect on petitioners.

3. In the proceedings below the parties were in agreement as to certain of the legal principles embodied in the relevant statute—the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* First, it was undisputed below that ERISA does not require any employer to establish any particular kind of pension plan. Indeed, the statute leaves an employer free to establish no pension plan at all if it believes it will be able to attract an adequate labor force without such a plan. Conversely, if an employer believes that it would be in its own self-interest to establish a pension plan, it is entitled to "design" the plan (subject to certain statutory requirements not relevant here) so as to conform to its own business needs and resources. Thus it can "design" the benefits to be conferred on particular employees in such a way as to make the total financial demands of the plan "affordable" by

the employer.[4] By hypothesis, an employer will establish and fund a plan only if it considers the plan to be in its own business interests.

Once an employer-designed plan has been created, it is managed or administered by a trustee or "administrator" who receives the necessary funding from the employer, manages the assets, and distributes the benefits to those entitled to receive them. Thus the "design" and the "administration" of such a plan involve quite separate responsibilities and are subject to different standards of judicial review. In their briefs in the proceedings below petitioners themselves affirmatively recognized that the "courts have no role in deciding whether the *design* of a plan is reasonable or not," citing *Moore* v. *Reynolds Metals Company Retirement Program*, 740 F.2d 454 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985).[5] On the other hand, in the proceedings below petitioners

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[4] An alternative to such a "defined benefit plan" (in which benefits are determined under a specified formula) is a "defined contribution plan" under which the employer commits itself to make specified levels of contributions. The amount of the contributions plus earnings, if any, then determines the amount of pension or other benefits to be provided. Such a plan may leave it to the plan's trustees or administrators to determine who should receive what benefits and the amount of those benefits in light of the available assets. See Sinai Hospital of Baltimore, Inc. v. National Benefit Fund of Hospital & Health Care Employees, 697 F.2d 562 (4th Cir. 1982); Struble v. New Jersey Brewery Employees Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984).

[5] The quoted language (to which we have added emphasis) is from petitioners' brief in opposition to respondents' motion to dismiss the Complaint in the district court below. The same language was brought to the attention of the court of appeals below in respondents' brief at pp. 2, 23.

emphasized—and respondents did not dispute—that under ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), those responsible for the "management" or "administration" of a pension plan are by definition "fiduciaries" with fiduciary obligations to the plan's beneficiaries—which means that, if there is a judicial challenge to a plan administrator's decision with respect to the management or administration of the plan's assets, the reviewing court is authorized to determine whether there has been a breach of any fiduciary duty. For present purposes the decisively significant ERISA principle to which all parties seem to agree is (in the words of the responsible enforcement agency, the U.S. Department of Labor [6]) that "decisions relating to the establishment, termination and *design* of [pension] plans . . . are not fiduciary activities subject to Title I of ERISA." [7]

4. Following implementation of the SHARP program, petitioners brought suit in the U.S. District Court for the Eastern District of Pennsylvania against Scott and the administrator of SERP and SHARP

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[6] The quoted language appears in an official Labor Department letter intended for publication. 12 BNA Pension Rep. 472-73 (Mar. 17, 1986) (emphasis added).

[7] See *Moore, supra,* citing UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982); Sutton v. Weirton Steel Division, 567 F. Supp. 1184 (N.D. W. Va.), *aff'd,* 724 F.2d 406 (4th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984). The petition's first "Question Presented" begs the question by referring to the "dispos[al] of pension trust assets" without distinguishing between administration and design. The former function is admittedly "subject to common law and ERISA fiduciary duties," while a design decision (as petitioners concede) is not.

(the respondent "Scott Retirement Board"), seeking (in effect) a ruling that one or the other or both of the respondents had a legal duty to make SHARP's early retirement benefits available on a uniform basis to all salaried Scott employees regardless of location. The theory of liability, which has been gradually changing since suit was filed, appears to be that in implementing SHARP Scott caused pension fund assets (repeatedly described as "surplus assets") to be "used" for Scott's "own purposes" and that this "use" of the assets by Scott violated a fiduciary obligation imposed by ERISA. Pet. at 9-13. The notion seems to be that, once Scott has handed over funds to the plan administrator, they are thenceforth "someone else's money" (Pet. at 12) and that Scott had no right to require that funds contributed by Scott be used in aid of a retirement program which was admittedly designed to benefit the company by enhancing its efficiency.

The case was submitted on stipulated facts (supplemented by the deposition testimony of three Scott executives) on cross-motions for summary judgment. The district court concluded that "[i]n view of the parties' stipulation of facts" the case involved "no genuine issues of material fact" and that "summary disposition" would be appropriate (App. 32a). The court then held that the "fiduciary duties" arising from ERISA are not operative when an employer makes "decisions regarding which business units should be included in a retirement program" and dismissed petitioner's basic ERISA claims on that ground (App. 37a). Petitioners having advanced an additional claim that they had a "private cause of action" to remedy an alleged pension plan "top heaviness" in violation of Title II of ERISA, the court

dismissed the claim on the ground that it had not been timely raised (App. 38a), and it dismissed a claim of age discrimination on the ground, *inter alia*, that in fact there had been no discrimination based upon age (*id.*).[8]

5. The Court of Appeals for the Third Circuit unanimously affirmed, emphasizing that petitioners were complaining only of a "design decision" falling outside the fiduciary requirements of ERISA (App 9a). The court also emphasized that petitioners' "rights under SERP" were in no way decreased by the establishment of the SHARP program and hence that petitioners had suffered no injury from any improper diversion of funds (App. 10a). The court recognized that SHARP had conferred upon Scott an "indirect benefit of enhanced efficiency" but pointed out that nothing in ERISA renders "such consequential benefit . . . impermissible" (*id.*). As to petitioners' remaining claims, the court of appeals did not disturb the district court's decision that petitioners' "top heaviness" claim was not "appropriately before the district court" (App. 12a), and it agreed with the district court's factual conclusion that petitioners had not shown any discrimination based on age (*id.* at 13a).

Thereafter petitioners sought rehearing. On December 4, 1987, an order was entered denying both

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[8] Having disposed of all of petitioners' federal claims, the district court exercised its discretion to dismiss certain state claims without prejudice on the authority of United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). The petition does not purport to seek review of the latter discretionary ruling (which was affirmed by the court of appeals, App. 13a-14a).

rehearing by the panel and rehearing *en banc* (App. 1a-2a).

SUMMARY OF ARGUMENT

The petition presents no question worthy of review. The petition is incorrect in asserting that the ERISA issue decided below has been previously decided by other circuits in a conflicting manner. In each of the allegedly conflicting decisions the administrator of an ERISA pension plan had decided to use pension plan funds in a way which would have directly benefitted the employer *and* reduced the future benefits of the complaining employees, thus violating the administrator's fiduciary duty to the latter. Here, by contrast, the only challenged decision was an employer's non-fiduciary "design" decision which did not in any way adversely affect the complaining employees (*i.e.*, petitioners).

Although the petition argues in effect that the courts below established an "important" precedent by authorizing an employer to "use" pension plan funds for its own direct benefit, in fact all such funds are being and will continue to be used exclusively for the payment of benefits to the beneficiaries entitled thereto, including these petitioners, whose pension rights remain totally unaffected by anything done by respondents in this case.

The remaining issues as to which review is sought are unique to the present dispute and thus unworthy of review.

ARGUMENT

I. THE DECISIONS BELOW DO NOT CONFLICT WITH ANY DECISION IN ANY CIRCUIT[9]

In arguing that the decisions below conflict with certain decisions in the Second and Fourth Circuits —and, indeed, with certain decisions of the Third Circuit itself—petitioners cite cases in which administrators or trustees of a pension plan have attempted to use plan funds for the direct benefit of the employer at the expense of plan beneficiaries. In the case upon which petitioners principally rely, *Donovan* v. *Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982), the trustees of a pension plan (who also happened to be officers of the employer company) made a decision as to how to invest Plan assets—a decision to which a fiduciary obligation clearly attached—and decided to invest the funds in a way calculated to help the employer fight off a hostile take-over but not to protect the assets invested for the benefit of the Plan beneficiaries. Since the investment decision was thus not focussed, as it should have been, solely on the welfare of the Plan beneficiaries, the Second Circuit (per Friendly, J.) concluded that the decision had violated the trustees' fiduciary duties under ERISA.

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[9] The petition asserts that this Court's decision in NLRB v. Amax Coal Co., 453 U.S. 322 (1981), stands for the principle that ERISA "incorporate[s] the common law of trusts" (Pet. at 10) and that the decisions below are "contrary" to that principle (*id.*, at 9). But *Amax* in no way suggests that pension plan design decisions involve trust or fiduciary responsibilities, and this Court's decision in UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982), is generally interpreted as holding that they do not. *Moore, supra,* 740 F.2d at 456.

This case, by contrast, involves only an employer's "design" decision which petitioners acknowledge to be of a non-fiduciary character (see pp. 3-5, *supra*), and it has been stipulated that the decision in no way affected petitioners' SERP benefits.

Equally far afield is *Sinai Hospital of Baltimore, Inc.* v. *National Benefit Fund of Hospital & Health Care Employees*, 697 F.2d 562 (4th Cir. 1982), involving a multi-employer welfare benefits plan under which the employers' contribution levels had been defined but the design of the benefits had been delegated to trustees, thus requiring that the benefits be determined pursuant to normal fiduciary standards.[10] The employers then attempted to cause the trustees to exercise their discretion, not to maximize the benefits to be received by the beneficiaries, but actually to reduce such benefits (and the employers' future contributions), and again the court refused to allow the Plan beneficiaries to lose benefits in direct contravention of the trustees' fiduciary obligations. In the instant case, again, the challenged design decision of the employer was not fiduciary, and petitioners agree that they suffered no loss of benefits thereby.

Finally, the petition suggests that the decision of the Third Circuit below conflicts with the same Circuit's decision in *Struble* v. *New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984) (Pet. 11), but the suggestion is plainly wrong. *Struble* involved essentially the same institutional arrangement as that involved in *Sinai*, *supra*; the challenged conduct even more clearly violated applicable standards; and the case is thus even

[10] See note 4, *supra*.

more distinguishable than *Sinai*. Moreover, the *Struble* opinion was written by the same judge who authored the decision in the present case (Seitz, J.), and although petitioners below heavily emphasized *Sinai* and *Struble* in their arguments to Judge Seitz and his colleagues, it is obvious that the court could perceive no conflict between their conclusion in this case and the rulings in either *Struble* or *Sinai*.[11]

The reality is that the unanimous four-judge rulings below involve no conflict with earlier precedent.[12]

II. NONE OF THE "IMPORTANT ISSUES" SUGGESTED IN THE PETITION ARE IN FACT PRESENTED

The first asserted "reason for granting the writ" is that this case allegedly presents the "important" issue of whether ERISA permits an employer "to use" pension plan funds "for its own purposes" (Pet. 9). On the facts stipulated by the parties below, however, Scott did not "use" any pension plan assets "for its own purposes" except in the sense that *every* employer with an ERISA pension plan "uses"

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[11] In Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572 (11th Cir. 1987), also cited by petitioners (Pet. at 11), the question again was whether trustees had committed a breach of their fiduciary duties, and the case is thus as distinguishable as *Sinai* and *Struble*.

[12] The only known precedent, a district court decision, fully supports the rulings below. Ogden v. Michigan Bell Telephone Co., 657 F. Supp. 328, 336 (E.D. Mich. 1987) (where employer decided to institute early retirement program to achieve "force reductions," the decision was "a business decision not governed by the fiduciary standard of ERISA"). The petition's suggestion that there may be additional cases pending in certain Federal districts which may involve similar issues and from which some future conflict may arise (Pet. at 12) is based on pure speculation.

the plan's assets for its own benefit. Indeed, as previously noted, if the fact that a pension plan furthers the business interests of the employer were sufficient to give rise to a violation of ERISA, no pension plan could ever be established under the statute.

The petition also suggests (at 10) that the result reached below is "contrary to the spirit of the law" because it will encourage "employers to get rid of employees," thus lightening the future burdens of the pension plan and creating "a surplus which the employer can then use at its sole and unfettered discretion." That is simply incorrect. The departure of Scott employees for whatever reason (through resignation, firing, or early retirement) may reduce the company's payroll and in that sense create funds for Scott's "use," but the creation of SHARP created no Plan "surplus;" quite the contrary, because the contribution obligations previously undertaken by Scott are not sufficient to fund both SERP and SHARP, the creation of SHARP has required Scott to take on new and higher contribution obligations for the future.[13] In the last analysis the essential facts are (a) that all contributions can be used only for the benefit of Plan beneficiaries (including petitioners) until all Plan liabilities are satisfied, and (b) that the departure of other employees, for whatever reason, can have absolutely no effect on the benefits to be received by petitioners.

Moreover, the principle for which these petitioners seem to be contending—that it is improper for an

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[13] Here again, therefore, the petition is factually wrong in asserting that SHARP is being funded "from surplus assets in SERP" (Pet. at 4) and not with funds "from Scott" (*id.* at 5).

employer to induce early retirements selectively in the interests of enhancing efficiency—would lead to an ironic result: In the future every employer who wanted to achieve such efficiencies would be forced to fire the employees outright, rather than taking the more humane and expensive course of inducing voluntary early retirements through added pension plan benefits.

III. THE REMAINING ISSUES FOR WHICH REVIEW IS SOUGHT, BEING UNIQUE TO THE PRESENT DISPUTE, ARE NOT WORTHY OF CERTIORARI REVIEW

Substantial parts of the petition are devoted to the question of the distribution of authority between Scott and its Retirement Board. Pet. 6-8, 12-14. Those issues can only be resolved (and were resolved below) on the basis of the particular facts of the relationship between Scott and the Board, including the language of the particular legal documents bearing on that relationship. The factual aspects of the relationship were thoroughly reviewed by the four judges below (App. 9a-11a, 16a-19a, 33a-34a), and on that basis all four judges concluded that each of the two respondents, Scott and the Board, had acted in accordance with its authority. Since it is highly unlikely that that resolution could have any precedential value for later cases, the issues involved (including particularly the second and third "Questions Presented" in the petition) are not worthy of review on certiorari.

The same is true of the fourth "Question Presented" on the subject of age discrimination. All four judges below decided that the facts presented by this record do not show that there was discrimi-

nation (in the words of the applicable statute) "because of . . . age," and the petition's one-sentence reference to the matter (Pet. 14) does not even purport to claim a justification for certiorari review. Exactly the same is true of the untimely claim (which was not pleaded below) that there was some problem of "top heaviness" with SHARP.

CONCLUSION

The decision of the court of appeals does not merit review under the standards established by this Court. See Rule 17. It is not in conflict with any other judicial decision, and it involves no issue of any precedential importance. For these reasons the petition should be denied.

Respectfully submitted,

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April 1988

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